a determination of whether cable rates may be regulated in the first instance, and given the congressional focus on residential customers, Comcast submits that subjecting such establishments to rate regulation is both illogical and unsupported by the purposes of the statute.

#### (2) A Competitive Marketplace Exists for the Provision of MVPD Services to Commercial Establishments.

**As** the *NPRM* recognizes, "commercial subscribers may have greater access to competitive sources of supply."" In fact, commercial establishments have access to at least three competitive distributors — cable, DBS, and SMATV — and cable operators must compete fiercely each and every day for commercial accounts with MVPDs that are not burdened with carriage obligations for PEG and leased access programming, which cable operators are required to carry but in which commercial establishments have no interest. Cable operators across the nation, therefore, undoubtedly are subject to "effective competition" with regard to commercial establishments. This conclusion is confirmed by the overall growth of competition in the MVPD market.[92] Given these competitive circumstances, the Commission should permit cable operators to charge unregulated rates for services and equipment provided to any commercial establishment, which Comcast believes should be defined as any non-residential location where the audience consists of more than a single family and its guests.

Comcast also submits that unregulated rates for commercial establishments are fully justified by the substantial difference between residential and commercial accounts. Unlike residential customers, commercial accounts offer cable television programming to large numbers of people across the community and derive a direct and substantial benefit from doing *so.* These

---

*(. . . continued)*
by 70 percent of the *households* to which such systems are available[,]" 47 U.S.C. § 532(g) (emphasis added); and (iv) exempted under Section 652(d) any LEC that "serves less than 10 percent of the *households* in the telephone service area of such carrier" from the general prohibition against buy-outs of in-region cable operators, 47 U.S.C. § 572(d) (emphasis added).

91 *NPRM* at para. 30

92 *See infra* Section VI, pp.35-42 and nn.93-103.

establishments provide cable television service and advertise its availability specifically to draw additional customers and increase their patronage, as well as to provide general entertainment for members of the public who frequent their businesses. To the extent that consumers can watch cable programming at bars and sports taverns, they may not subscribe to cable at home. This has the effect of drawing business and revenue away from cable operators while enhancing the commercial establishments' ability to serve their patrons. Consequently, cable operators should be permitted to develop an unregulated commercial rate structure, not only to compete with alternative MVPDs such as DBS providers, but also to account for the significantly larger potential audience served by commercial establishments in bars, taverns, restaurants, as well as offices and other business establishments.

Finally, establishing separate rate schedules for residential and commercial customers has been a reasonable and long-standing common practice not only among cable operators, but also for regulated utilities providing such diverse products as telephone, gas, and electric service. Cable operators should be permitted to make the same business and marketing decisions as other similarly situated business. Given congressional intent, the explicit provisions of the 1992 Cable Act, the custom and practice of both the cable television business and other regulated industries, and basic concepts of commercial fairness, Comcast believes it is both appropriate and reasonable to expect that cable television rates for commercial establishments should remain free of regulation.

## VI. Effective Competition Showings.

Nowhere is the need to consider the intense competition that has developed in the MVPD market more compelling than in the Commission's procedures and rules regarding effective competition showings. During the past ten years, the number of DBS subscribers has increased from zero to more than nineteen million[93] and, as the Commission noted in the *NPRM*, as of June

93 According to SkyTrends, as of July 2002, there were 19,091,795 satellite subscribers nationwide. ***See*** http://www.skyreport.com/dth_counts.shtm (last visited October 11, 2002).

2001, “DBS penetration . . . exceed[ed] 20% of television households in 30 states and 30% in five states[,]”[94] which significantly exceeds the fifteen percent statutory definition of effective competition.[95] By April 2002, “direct to home penetration exceeded 15 percent in 44 states, 20 percent in 36 states, 25 percent in 22 states, 30 percent in seven states and 40 percent in one state.”[96] Nationwide, by June 2001, DBS operators controlled more than 18.2% of the entire MVPD market[97] and by June 2002 that control had risen to more than 19.2%.[98] Moreover, while annual cable television subscriber growth for the June 2000 through June 2001 period remained relatively flat at 1.9%,[99] the annual subscriber growth of DBS competitors EchoStar and DirecTV increased by 40% and 15% respectively for the same period,[100] and analysts then predicted that level of growth would continue unabated.”[101] Indeed, the analysts’ predictions have proven correct: “Between June 2001 and June 2002, the number of DBS subscribers increased from 16 million to over 18 million, a 12 percent annual growth rate.”[102]

Obviously, today’s competitive landscape is significantly and undeniably different than the one in existence when Congress enacted the 1992 Cable Act and when the Commission promulgated its effective competition procedures and regulations. Today, Comcast and other cable television operators fight fiercely with their unregulated DBS competitors not only to serve

---

94 *NPRM* at para. 53, citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eighth Annual Report,* 17 FCC Rcd 1244, 1273 at para. 58 (2002) *(“Eighth Competition Report”).*

95 47 U.S.C. § 543(*l*)(1)(B).

96 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, *Comments of the National Cable and Telecommunications Association* at 13 (filed July 29, 2002) (*“NCTA Comments”).*

97 *Eighth Competition Report,* 17 FCC Rcd at 1247, para. 8.

98 *NCTA Comments* at 12.

99 *Eighth Competition Report,* 17 FCC Rcd at 1247, para. 7.

100 *Id.* at 1272-73, para. 57.

101 *Id.* at 1272, para. *56.*

102 *NCTA Comments* at 12-13.

every new customer, but also to continue serving every existing customer. Moreover, due at least in part to an asymmetric regulatory and statutory model designed to provide DBS operators with a competitive "leg up," those competitors have captured a substantial share of the MVPD market[103] and are a significant and continuing competitive threat in every cable television franchise area in the nation.[104] The competitive position of DBS operators has been enhanced by statutory and technological changes enabling them to carry local broadcast signals,[105] and by regulations easing access to multiple dwelling unit tenants.[106] Moreover, DBS operators have for years been able to free-ride on cable's substantial investment in programming through the Program Access rules[107] and are unfettered by local franchise obligations such as PEG channels and financial support, free services to governmental and educational institutions, and, of course, franchise fees based upon a percentage of gross revenues. As noted above and as documented in the Commission's annual competition reports, DBS operators consequently have been able to capture a substantial and growing segment of the MVPD market.

---

[103] DBS market share grew from less than 70,000 subscribers in 1993, or 0.12% of the MVPD market, to more than 16 million, *or* 18.2% of the market, by June 2001. During the same period, cable's market share declined from 94.89% of MVPD subscribers to 78.11%. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report,* 11 FCC Rcd 2060, 2180 at App. G, Table I (1995); *Eighth Competition Report,* 17 FCC Rcd at 1338, App. C, Table C1.

[104] Both the Commission and the Cable Services Bureau have acknowledged that the presence of a large and powerful competitor "can have a competitive impact on a cable operator" even before the competitor "finishes installing its plant or rolling out its service." *Cable Act Reform Order,* 14 FCC Rcd at 5303-04, para, 11 (footnote omitted) (citing *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications,* 12 FCC Rcd 3143 (Cab. Serv. Bur. 1997); *Comcast Cublevision of the South,* 13 FCC Rcd 1676 (Cab. Serv. Bur. 1997)). Inasmuch as DBS service is offered and is available nationally and has captured a substantial share of the MVPD market, it obviously has had **a** competitive impact on all cable television operators.

[105] *See* Satellite Home Viewer Improvement **Act** of 1999, Pub. Law. No. 106-113, 113 Stat. 1501, Appendix I (1999) ("*SHVIA*"); 47 U.S.C. § 325(b)(3)(C).

[106] *See* 47 C.F.R. § 1.4000

[107] *See* 47 U.S.C. § 548; 47 C.F.R. § 76.1000-1004

Inasmuch as *the* fundamental assumption underlying the rate regulation and effective competition provisions of the 1992 Cable Act and the Commission's rules was a dearth of competition to cable television systems,[108] the time has come for the Commission to take a fresh look at its current presumption of no effective competition[109] and acknowledge the present-day reality that cable operators are in fact subject to effective competition wherever state-wide DBS penetration exceeds the fifteen percent statutory threshold.[110]

### A. The Commission Should Presume that Cable Operators are Subject to Effective Competition Wherever State-Wide DBS Penetration Exceeds Fifteen Percent of Occupied Households.

The Commission should rescind its presumption that cable operators are not subject to effective competition because the factual basis that may have once supported the presumption no longer exists and because the Commission has "recognize[d] that a cable operator has a statutory right to be free of rate regulation if effective competition exists."[111] The Commission should therefore alter its presumption of a lack of effective competition in any state where DBS

[108] In 1993, the Commission justified its regulatory presumption of no effective competition by reference to the congressional finding that substantial MVPD competition had yet to develop by 1992. "As Congress recognized in crafting the Act, the vast majority of cable systems today are not subject to effective competition." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking,* 8 FCC Rcd 5631, 5670 at para. 43 (1993) *("Rate Order")* (footnote omitted, citing 1992 Cable Act, § 2(a)(2); H.R. REP. NO. 102-628 at 29-30 ("[C]able's competitors serve, in the aggregate, fewer than 5 percent of American households.")).

[109] *See* 47 C.F.R. § 76.906.

[110] *See* 47 U.S.C. § 543(*l*)(1)(B)(ii)

[111] *Rate Order,* 8 FCC Rcd at 5669, para. 42. Although Comcast agrees with the suggestion in the *NPRM* that "the effective competition determination process should be expedited[,]" *NPRM* at para. 53, Comcast believes that "altering the burden of proof in areas of high DBS penetration so that community-by-community decisions might not always be needed," *id.*, may be inconsistent with the statutory definition of effective competition. Section 623(*l*) of the Communications Act, 47 U.S.C. § 543(*l*), defines "effective competition" with reference to the cable operator's franchise area. Indeed, the Commission concluded that "the determination of effective competition should be made on the basis of a franchise area" for precisely this reason. *Rate Order,* 8 FCC Rcd at 5672, para. 47.

penetration exceeds the fifteen percent statutory threshold[112] and allow LFAs to rebut that presumption with franchise specific information demonstrating that effective competition is lacking in their franchise area.

Comcast suggests the following procedure to implement this conditional presumption of effective competition. Where a cable operator believes it is subject to state-wide effective competition, it should be required to submit a petition attaching SkyTrends or other equivalent documentation demonstrating that DBS penetration in the relevant state exceeds fifteen percent (15%) of occupied households. The operator would be required to serve the petition on all certified LFAs in areas where the operator is seeking a determination of effective competition within the state. If no opposition to the petition is received within thirty (30) days, a determination of effective competition should be deemed granted in all affected franchise areas in the state that declined to oppose the petition. Any affected LFA within the state opposing the operator's petition within the thirty (30) day period should be required to demonstrate a lack of effective competition within its franchise area using the same data and information that cable operators routinely use now to demonstrate the existence of effective competition. The operator should then have an opportunity to reply to the opposition pursuant to the Commission's existing rules. To ensure that LFAs are not unduly burdened in obtaining information regarding DBS competition in their franchise areas, the Commission should simply amend Section 76.907(c) of the rules[113] — which requires competitive distributors to provide timely information regarding the extent of their service in the franchise area at their own expense — toinclude LFAs as well as cable operators. Comcast submits that this procedure is consistent with the statute and with the Commission's determination establishing the use of presumptions for effective competition showings. Moreover, this procedure will reduce administrative burdens on cable operators, LFAs, and the Commission while ensuring reasonable MVPD rates.

---

[112] 47 U.S.C. § 543(*l*).

[113] 47 C.F.R. § 76.907(c).

In the *Rate Order,* the Commission established presumptions for effective competition showings in an effort to balance competing statutory and practical concerns. For example, although the 1992 Cable Act required "the Commission to 'find' that a cable system is not subject to effective competition before authorizing rate regulation[,]" the Commission understood that due to "the sheer number of franchise areas . . . [its] procedures cannot rely on a thorough Commission analysis of effective competition for each franchise area in any timely fashion."[114] Moreover, while Congress intended that the Commission "adopt a simple, streamlined process[,]"[115] the Commission also "recognize[d] that a cable operator has a statutory right to be free of rate regulation if effective competition exists."[116] In the final analysis, although the Commission initially stated "it would be reasonable to require local franchising authorities to provide evidence of the lack of effective competition as a threshold matter of jurisdiction[,]"[117] the Commission credited LFA comments that they did not have access to information regarding the extent of competition in their franchise areas,[118] and determined to "presume that the cable operator is not subject to effective competition."[119] The Commission supported that determination with Congress's 1992 finding that "the vast majority of cable systems today are not subject to effective competition."[120]

The factual predicate underlying the Commission's current presumption no longer is accurate, however, given the fundamental changes to the state of MVPD competition that have occurred since passage of the 1992 Cable Act and the adoption of the Commission's rules. Consistent with the Commission's initial determination to establish a presumption for the

---

[114] *Rute Order, 8* FCC Rcd at 5669, 5670-71, para. 39, 41

[115] *Id.* at 5669 para. 41.

[116] *Id.* at 5670, para. 42.

[117] *Id.* at 5667, para. 39.

[118] *Id.* at 5669, para. 41.

[119] *Id.* at 5670, para. 42.

[120] *Id.* at 5670, para. 43 (footnote omitted).

purpose of effective competition showings, the Commission's rules should now reflect a presumption that accurately reflects the competitive state of the MVPD market. Record evidence currently before the Commission demonstrates that DBS penetration now substantially exceeds the statutory effective competition test state-wide in a majority of the states in the nation.”’ Comcast believes such widespread levels of actual competition justify a presumption that effective competition is present. Moreover, both Congress and the Commission have acknowledged that the mere presence of a large and well-financed competitor, such as a local exchange carrier (“LEC”), can justify a finding of effective competition without regard to the competitor's penetration.”’ The fact is that DBS operators provide a substantial and viable continuing competitive threat to cable operators in every franchise area in the nation; and, this is so regardless of actual DBS penetration in a particular franchise area, just as the presence of a wire-line LEC MVPD would.[123]

Under these circumstances, the adoption a presumption of effective competition in any state where DBS penetration exceeds the statutory fifteen percent test is reasonable and appropriate. The procedure Comcast has proposed above to implement this conditional presumption will also reduce burdens on both LFAs and the Commission. Operators will still be required to prepare and file petitions to establish the presumption. LFAs will have the discretion to acknowledge the existence of effective competition by simply declining to file an opposition with the Commission, and no additional action by the Commission will be required in those cases. Any LFA that believed both that effective competition did not exist in its franchise area and that the cable operator's BST rates required regulation should be free to rebut that presumption using the same widely available information that cable operators now use to

---

[121] *See Eighth Competition Report*, 17 FCCR at 1273, para. 58; *NCTA Comments* at 13.

[122] *See* 47 U.S.C. § 543(*l*)(1)(D); *Cable Act Reform Order*, 14 FCC Rcd at 5303-04, para. 11.

[123] *See supra* n. 104; such competition “can have a competitive impact on a cable operator” even before the competitor “finishes installing its plant or rolling out its service.” *Cable Act Reform Order*, 14 FCC Rcd at 5303-04, para. 11.

demonstrate effective competition.[124] Comcast believes little doubt can exist that such an approach will reduce administrative burdens for all parties while ensuring that BST rates will be remain subject to regulation in the absence of effective competition.

Finally, given the ubiquitous national competition provided by DBS operators, the Commission also should streamline the effective competition process. In light of sustained national advertising campaigns that include direct mail, television, radio, newspaper, billboard, and telemarketing, cable operators should be relieved of the requirement to demonstrate consumer awareness of DBS availability in the operator's franchise area. Similarly, the Commission should take official notice that DBS providers offer comparable programming and that DBS is offered to more than fifty percent of households in the operator's franchise area. In today's competitive market, the Commission can safely remove these unnecessary administrative burdens and also presume consumer awareness, comparable programming, and the offering of DBS service throughout all cable franchise areas.

---

[124] Unlike in 1993, when LFAs claimed that they were unable to obtain information regarding the extent of competition in their franchise areas, *Rate **Order,*** 8 FCC Rcd at 5668-69, para. 41 and n. 138, today such information is easily obtainable and widely available. The Commission could also virtually eliminate any perceived burden on LFAs in obtaining such information simply by enforcing Section 76.907(c) of the rules, 47 C.F.R. § 76.907(c), which requires competitive distributors to provide timely information regarding the extent of their service in the franchise area. Unfortunately for cable television operators, despite the Commission's holding that "alternative distributors will be required to supply the necessary information [for the effective competition showing] at their own expense[,]" *Rate **Order,*** 8 FCC Rcd at 5671, para. 45, the Commission's rule is honored only in the breach with regard to cable operators and their DBS competitors. This has forced cable operators to obtain competitive information regarding DBS operators and to correlate that information to the operator's relevant franchise area at their own expense.

## VII. Equipment and Inside Wiring Rate Regulation.

### A. The Commission Should Deregulate the Installation, Lease, and Sale of Subscriber Premises Equipment Whose Primary Purpose is the Provision of Digital, HDTV, and Unregulated Services.

Comcast agrees that the Commission's previous expansive reading of the statutory phrase "used by subscribers to receive the basic service tier[,]"[125] has been overtaken by regulatory, technological, and competitive changes that have occurred since the Commission adopted its equipment and installation rate regulations. These developments warrant a fresh look at whether advanced equipment should be regulated under the Commission's rules or whether operators should have the discretion to include some or all of such equipment in their FCC Form 1205 rate computations.

The fundamental issue facing the Commission is whether cable operators will be allowed the flexibility to compete with DBS providers and other unregulated competitors in the marketing and deployment of advanced customer premises equipment on a level playing field. The *NPRM* implicitly recognizes that the Commission is in a position to provide the public with the benefits of competition while ensuring reasonable rates for BST customers. This can be accomplished by the elimination of rate regulation of equipment that is primarily used for the provision of digital and advanced premium services which under the Cable Act are not subject to regulation.[126] Comcast submits that by allowing cable operators the discretion to offer the lease, sale, and installation of equipment capable of providing digital and HDTV services at unregulated rates, the deployment of advanced services and equipment will be accelerated.

As noted in the *NPRM*, despite the Commission's acknowledgment that the 1992 Cable Act contemplated some equipment would be associated primarily with tiers other than the BST, it initially adopted an expansive reading of regulated equipment "even though it resulted in

---

[125] 47 U.S.C. § 543(b)(3)(A). *See NPRM* at para. 46.

[126] *NPRM* at paras. 46-48.

virtually no equipment coming within the CPST tier equipment definition.”’” The Commission reached this determination initially in part because “[a]lthough [the Commission] believe[d] that Congress intended [its] regulations to encourage a competitive market in the provision of equipment and service installation. . . [the Commission did] not have the information [it] would need to establish an effective competition test for equipment and installation at [that] time.”[128]

Much has changed over the intervening years. DBS operators offering all-digital services and equipment have become a ubiquitous competitive alternative to cable operators throughout the nation.’” In response, cable operators have made enormous investments to upgrade their systems and introduce digital service tiers, which require the use of advanced equipment that is unnecessary for receiving the standard BST or CPST. In addition, the 1996 Telecommunications Act and the Commission’s regulations have laid the groundwork for a fully competitive market for the provision of all cable television customer premises equipment.[130]

The Commission has recognized in other contexts that regulation becomes unnecessary where competition is present to ensure that rates and terms of service remain reasonable. For example, a cable operator’s offering of an inside wire maintenance plan covering both cable television and telephone inside wiring is no longer subject to regulation by the Commission where competition is present for such services.”’ The Commission also exempted “New Product Tiers” from regulation due to competition from regulated CPSTs.[132] Today, no doubt can exist

---

[127] *Id.* at para. 45.

[128] *Rate Order,* 8 FCC Rcd at 5806, para. 286.

[129] *See supra* nn.93-103; *Eighth Competition Report,* 17 FCC Rcd at 1247, 1272-74.

[130] *See* 47 U.S.C. § 549; Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, *Report and Order,* 13 FCC Rcd 14775 (1998), *petitions for review denied sub nom. General Instrument Corp. v. FCC,* 213 F.3d 274 (D.C. Cir. 2000).

[131] Request for Clarification of Rate Regulatory Rules: Inside Wire Maintenance, *Memorandum Opinion and Order,* 16 FCC Rcd 2198 (2001).

[132] *Sixth Reconsideration Order, 10* FCC Rcd 1226, 1234-39 at paras. 22-37.

that cable operators' offerings of advanced digital customer premises equipment — which provides unregulated premium digital services as well as premium per-channel and per-program offerings — compete directly with nearly identical equipment and services offered by their DBS competitors and will soon compete with similar equipment offered by third-party national retailers. This competition will continue to ensure that the rates for leasing, selling, and installing such equipment remain reasonable.

Given this marketplace environment, cable operators should have the discretion to establish regulated rates for some or all categories of advanced equipment while offering other types of such equipment at market-based rates if they elect not to include the costs of such equipment on FCC Form 1205.[133] Comcast submits that the flexibility to offer unregulated equipment associated with unregulated program services will help to accelerate the deployment of advanced digital services and the transition to digital broadcasting in accordance with market demand rather than government regulation and would therefore fully serve the public interest.

[133] The new-found flexibility that cable operators will have to market advanced equipment with digital and HDTV services also will benefit the analog-only customer by enabling the removal of certain high-cost equipment from the FCC Form 1205 ratebase used to calculate regulated rates for analog converter and remote control equipment. Because costs associated with the substantially more expensive advanced digital equipment may be aggregated and averaged in broad equipment categories pursuant to the Commission's equipment aggregation rules, removal of such advanced equipment from the operator's regulated ratebase on FCC Form 1205 will, all other things being equal, result in reduced rates for analog converter and remote control equipment. ***See*** Implementation of Section 301(j) of the Telecommunications Act of 1996, Aggregation of Equipment Costs By Cable Operators, *Report and Order,* 11 FCC Rcd 6778 (1996); 47 C.F.R. § 76.923(c)(1). Comcast also believes, however, that operators should retain the option of establishing a regulated rate for such equipment by including its costs on FCC Form 1205.

## VIII. Charges for Changes in Service Tiers.

### A. The Commission Should Clarify that Charges for Service Tier Changes are Unregulated.

The Commission should clarify that charges for programming service tier changes may not be regulated by LFAs because (i) the 1992 Cable Act authorized only the regulation of charges for subscriber initiated changes in services and equipment that were themselves subject to regulation under the statute and because (ii) only the BST and the equipment used to receive the BST are subject to regulation under the Communications Act.[134] Rather than simply eliminate Section 76.980(b), (d)-(f) of the Commission's rules, as proposed in paragraph 9 of the *NPRM*, the Commission should clarify that Section 76.980 is applicable only to regulated equipment and services, and that LFAs therefore are prohibited from regulating charges for customer initiated changes in services and are limited to regulating charges for changes in regulated equipment.

Section 623 (b)(5)(C) of the Communications Act charged the Commission with implementing and enforcing, among other things:

> standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment *subject to regulation under this section,* which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method.[135]

In accordance with the statute, and because both the BST and CPSTs were subject *to* regulation, the Commission adopted regulations in 1993 that specifically permitted cable operators to recover the costs incurred by subscriber requested upgrades and downgrades in service.[136] Those

[134] ***See*** 47 U.S.C. § 543(c)(4).

[135] 47 U.S.C. § 543(b)(5)(C) (emphasis added).

[136] The Commission held that operators may impose a nominal charge, *i.e.*, any charge under *(continued. . .)*

regulations were codified in Section 76.980 of the Commission's rules, and cable operator charges for service changes have since been regulated by LFAs pursuant to Section 76.923 of the rules and the FCC Form 1205 equipment and installation rate form.

Given the congressionally prescribed elimination of CPST regulation in March 1999,[137] however, the statutory basis for regulating charges for any customer initiated changes in programming services has been removed. Therefore, although LFAs may continue to regulate charges for changes in regulated equipment — *i.e.*, equipment "used to receive" the BST pursuant to the Commission's rules — the Commission should revise and clarify its rules to reflect statutory changes that have occurred since adoption of Section 76.980. Comcast believes that to implement the statute faithfully, the Commission's rules must state that LFAs are prohibited from regulating charges for customer initiated changes in services and are limited to regulating charges for changes in regulated equipment. This approach would he consistent with the Commission's determination in the ***Rate Order*** to preempt state and local laws and regulations regarding charges for tier changes "to the extent that they conflict with Commission rules implementing Section 623(b)(5)(C)."[138]

*(. . . continued)*
$2.00, for subscriber service changes "effected solely by coded entry on a computer terminal or by other similarly simple method." ***Rate Order,*** 8 FCC Rcd at 5833, para. 322. The Commission also authorized increased charges for changing service tiers more than twice in one year; ***e.g.***, "if a customer changes service tiers for a third time in one year, the charge might be $5.00, and the charge for the fourth change might be $10.00." *Id.* at 5834, n.796. For changes in service that involved more than simply a coded entry on a computer, the Commission held that its actual cost standard generally applicable to equipment and installation charges would determine the permitted charge. "The actual cost charge would be either the HSC times the [actual] amount of time it takes to effect the change or HSC times the average time such changes take." ***Id.*** at 5834, para. 323. The Commission also held that "the same standards should apply to upgrades and downgrades in service tiers because the same costs are involved in both types of changes." ***Id.*** at 5833, para. 321 (footnote omitted).

[137] *See* 47 U.S.C. § 543(c)(4); 1996 Telecommunications Act, § 301(b)(4), 110 Stat. 56, 115.

[138] ***Rate Order,*** 8 FCC Rcd at 5833, n. 793.

## IX. Recovery of Lost Equipment and Installation Revenues due to Subsequently Reversed Rate Orders.

### A. The Commission Should Permit Recovery of all Lost Revenues on FCC Form 1240 Pursuant to Section 76.944(c) of the Rules.

Comcast supports the Commission's proposal to "allow cable operators to recover the amount of revenues lost or excess refunds paid due to local rate orders subsequently reversed by the Commission."[139] As the Commission observed, with regard to equipment and installation revenues, under its current rules cable operators are "unable to recoup revenues lost or refunds paid pursuant to the erroneous rate order. . . . [and] when franchising authorities unreasonably limit rates, they deny operators the cost recovery determined to be permissible under the Commission's rules and rate forms and contemplated by section 623(b)(3) [of the Communications Act]."[140]

Comcast notes, however, that the Commission's proposal to allow recovery "through an entry on Form 1205, perhaps as an 'other' expense on Form 1205, Schedule B"[141] will not achieve the Commission's intended result because the mechanics of FCC Form 1205 will reduce the amount reflected on Schedule B by the Customer Equipment and Installation Percentage found on Step **A,** Line 4 of the Worksheet for Calculating Permitted Equipment and Installation Charges. This would prevent full recovery of the operator's lost revenues. Comcast therefore suggests that the Commission consider two other options for allowing operators to recover such costs: (i) through the true-up mechanism on FCC Form 1240, which can be accomplished with only the most minor changes to the Commission's rules and FCC Form 1240; or (ii) as **an** incremental temporary add-on to the BST rate similar to the manner in which network upgrade currently are recovered under Section 76.922(j) of the rules, which would entail no changes whatsoever to the Commission's rate forms

139 *NPRM* at para. 50.

140 *Id.*

141 ***Id.***

Under Section 76.944(c) of the Commission's rules, "[a]n operator that uses the annual rate adjustment method under Section 76.922(e) may include in its next true up under Section 76.922(e)(3) any amounts to which the operator would have been entitled but for a franchising authority decision that is not upheld on appeal."[142] The Commission merely need clarify that Section 76.944(c) applies equally to both service and equipment rates to achieve the objective of making cable operators whole in response to unreasonable LFA rate orders. In terms of the Form 1240 mechanics, the Commission has several options. Comcast believes the simplest and easiest to administer option would be to instruct operators to include the total amount of lost revenues in the Module F, Line F8 entry.[143]

In the alternative, the Commission may consider allowing operators to recover such costs by temporarily adding to the BST rate an incremental charge sufficient to recover the revenues lost or refunds paid pursuant to the erroneous rate order, in the same manner as network upgrade costs are now recovered under Section 76.922(j)(5) of the rules.[144] If the Commission were to adopt this option, Comcast believes the simplest and easiest to administer procedure would be to allow operators to calculate the incremental MPR adjustment in the same manner as CPST rate refunds using IRS interest information. This methodology is well understood by both operators and LFAs and is familiar to the Commission's staff. In addition, implementation of this methodology would require no amendments to the Commission's rate forms and, in Comcast's view, therefore imposes the least possible administrative burden on all parties.

---

[142] 47 C.F.R. § 76.944(c).

[143] In accordance with the Line F8 calculation, operators would include in Line F8 the total amount of revenues lost, divided by the number of months in the true-up period and divided further by the actual number of subscribers in the true-up period (*i.e.*, Line B1). This would reduce the amount to a per-month, per-subscriber charge for use in Module H.

[144] 47 C.F.R. § 76.922(j)(5).

## X. Procedures for Commission Review of Local Rate Decisions.

### A. The Commission Should not Increase the Deference Accorded to LFA Rate Decisions.

In contrast to the suggestion in paragraph 54 of the *NPRM*, the Commission's standard of review for LFA rate orders should not "be increased so that the Commission would intervene only when there were significant deviations from the established rules.'' The adoption of this suggestion would almost certainly result in an increase in the number of local rate order appeals brought before the Commission, and so would increase rather than reduce the Commission's workload regarding LFA rate orders. It also would result in less, rather than more, certainty and consistency in the regulatory process.

If anything, the Commission should reduce its overly deferential approach to reviewing such orders. Many LFAs seemingly are either unfamiliar with or are confused by the Commission's rate regulations and too often are unwilling to adhere to rules and procedures with which they neither understand nor agree. **As** the Commission is well aware, many LFAs continue to address non-rate issues by arbitrarily rejecting an operator's rate justification.[145] The Commission's guidance therefore is needed regarding the proper interpretation and application of its rules, and cable operators should be entitled to rely on that guidance to establish a uniform national application of the Commission's rules.[146] If the wide latitude currently afforded to LFA rate orders suddenly is increased, so will the Commission's workload as LFAs attempt to "push

---

[145] Using its existing standard of review, the Commission has repeatedly overruled local franchising authorities who reject legitimate rate increases for improper reasons. *See, e.g.*, *TCI TKR of Georgia*, 16 FCC Rcd 14551 (Cab. Serv. Bur. 2001); *Falcon Cable Media*, 13 FCC Rcd 11996, 11998 para. 6 (Cab. Serv. Bur. 1998) Century *Cable of Southern California,* 11 FCC Rcd 501 (Cab Serv. Bur. 1995)

[146] For example, the Commission should take this opportunity to clarify that LFAs are prohibited from ordering refunds for putative BST overcharges where an operator is filing pursuant to the Commission's annual rate adjustment rules, in which any such overcharges would be returned to subscribers with 11.25% interest by operation of the FCC Form 1240 true-up process.

the envelope" and cable operators are forced to bring appeals of local orders that simply cast aside the Commission's regulations and precedent.

Moreover, LFAs, many of which rely on both taxpayer dollars and a percentage of the cable operator's gross revenues, may be less sensitive than private businesses to the cost of pursuing litigation. This state of affairs imposes enormous administrative and financial burdens on both cable operators and the Commission, and impinges on the integrity of the Commission's rate regulation process.

### B. The Commission Should Provide Specific Directions to LFAs in Remanding Local Orders Reversed on Appeal.

Comcast submits that to reduce burdens on all parties and maintain the integrity of the rate regulation process, the procedural aspects of the Commission's review of LFA rate orders should be changed so that incorrect and unreasonable local orders are not, as they are now, simply remanded without specific instructions to the LFA.

As noted above, LFAs need the Commission's assistance to properly interpret and implement the Commission's admittedly complex rate regulations, and cable operators should be entitled to rely on a uniform application of those regulations in all their franchise areas. The Commission should therefore act to eliminate undue administrative burdens and should not hesitate to interpret and direct compliance with its rate regulations. The Commission should also require LFA implementation of the Commission's remand orders within sixty (60) days to protect cable operators from potentially unlimited regulatory uncertainty.

The case of *Maryland Cable Partners, L.P. v. City of Bowie, Maryland* provides an apt, but unfortunately not uncommon, example.[147] *Maryland Cable* involved the straightforward application of the Commission's rule that statutory tax rates be used in completing FCC Form

---

[147] *Maryland Cable Partners, L.P. v. City of Bowie, Maryland,* 12 FCC Rcd 11951 (Cab. Serv. Bur. 1996); 13 FCC Rcd 5218 (Cab. Serv. Bur. 1998), *application for review denied,* 15 FCC Rcd 10964 (2000); 15 FCC Rcd 12662 (Cab. Serv. Bur. 2000).

1205.[148] The City in that case acknowledged, but declined to follow, the Commission's rules or the Commission's remand decision, and ordered the operator to provide substantial refunds. According to the City, "[a]lthough the Federal Communications Commission Cable Services Bureau has determined to use a uniform rate for whatever reason . . . the [City] believes that it is appropriate to use the actual taxes paid by the operator."[149] Due to the City's "belief' in that case, the cable operator was forced to take three separate appeals to the Commission, defend against the City's application for review, and spend four years litigating the matter before the Commission. As the Commission noted in denying the City's application for review, "[t]he City interpreted the Bureau's remand to hold that the City was simply required to explain its reason for a 0% rate, not that the City could not use a 0% rate."''' The Commission, however, could have avoided the undue administrative and financial burden that the City imposed on the operator and the Commission by simply issuing specific directions to the LFA rather than simply remanding the matter "to the local franchising authority for further proceedings consistent with this order."''

Comcast believes the Commission should act now to relieve cable operators of the current quagmire, exemplified by the *Maryland Cable* case, in which local rate orders must be appealed to the Commission several times before the LFA conforms its behavior to the

---

[148] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Second Report and Order, First Order on Reconsideration. and Further Notice of Proposed Rulemaking ("Final Cost Order"),* 11 FCC Rcd 2220,2255 (1996); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Report and Order and Further Notice of Proposed Rulemaking,* 9 FCC Rcd 4527,4612,4634-35 (1994) *("'FirstCost Order");* FCC Form 1205, pp. 8-10.

[149] *Maryland Cable Partners,* 13 FCC Rcd 5218 at para. 14 (alteration in original) (quoting LFA rate order).

[150] *Id.* at para. 6.

[151] *Maryland Cable Partners,* 12 FCC Rcd 11951 at para. 9.

Commission's rules. Rather than extend the deferential standard of review applied to LFA actions in rate regulation matters, in the interest of regulatory certainty and national uniformity in the application of the Commission's rules, and to reduce administrative burdens on cable operators and the Commission, the Commission should not hesitate to take a position of leadership in the application of its regulations. Therefore, in remanding BST rate orders reversed on appeal, the Commission should clearly explain the application of its rules to the case at hand, and should direct specifically and in detail the actions that LFAs will be required *to* take pursuant to a Commission remand. Moreover, the Commission should establish for LFAs a specific time period in which those actions must be implemented. Comcast submits that sixty (60) days would be a reasonable period in which to comply with the Commission's remand order. This will ensure that LFAs take up the Commission's remand orders in a timely manner and that they will act consistent with the Commission's findings.

## XI. Other Matters.

### A. The Commission Should Delete the Reference to Cable Programming Service in the Uniform Rate Rule.

Although not mentioned in the NPRM, the Commission has solicited comment regarding other possible changes to the theory and mechanisms of BST rate regulation "that might logically follow from the changed scope of regulation and intervening developments subsequent to the adoption of the initial rules."[152] In this regard, and given the deregulation of CPST pursuant to the 1996 Telecommunications Act, Comcast suggests that the Commission eliminate the reference to cable programming service in Section 76.984 of the rules.[153] Omission of this issue from the otherwise comprehensive NPRM appears to be nothing more than an inadvertent oversight, and elimination of the reference is justified fully by developments that have occurred since the Commission adopted its initial rules in 1993, including the Congress's explicitly

[152] *NPRM* at para. 3.

[153] 47 C.F.R. § 76.984(a).

expressed intent in the 1996 Telecommunications Act to remove unregulated services from the ambit of the uniform rate structure rule.

In the 1992 Cable Act, Congress required that cable operators "shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[154] The Commission initially determined that the this uniform rate structure rule properly focussed "on regulated systems in regulated markets,"[155] which the United States Court of Appeals for the District of Columbia Circuit later emphasized was the correct interpretation.[156] In the 1996 Telecommunications Act, Congress amended the uniform rate provision by, among other things, exempting from the scope of the provision "any video programming offered on a per channel or per program basis."[157] Possibly because the CPST remained subject to regulation in 1996, the statutory language omitted a specific exemption for the CPST, which Congress determined would be deregulated in March 1999.[158] Nevertheless, Congress stated explicitly that the purpose of its amendment was to clarify "that a cable operator must comply with the uniform rate structure requirement in section 623(d) of the 1992 Cable Act *only with respect to regulated services*."[159]

Given congressional intent to limit the uniform rate provision to regulated services and its concomitant determination to deregulate CPSTs, Comcast believes the Commission should conform its rules accordingly and eliminate the reference to cable programming service in Section 76.984 of the rules.

---

[154] 1992 Cable Act, § 3(a), 106 Stat. 1464, codified at 47 U.S.C. § 543(d).

[155] *Rate Order, 8* FCC Rcd at 5896.

[156] *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190-91 (D.C. Cir 1995).

[157] 1996 Telecommunications Act, § 301(b)(2), 110 Stat. 115, codified at 47 U.S.C. § 543(d)(2).

[158] 47 U.S.C. § 543(c)(4).

[159] H.R. CONF. REP. NO. 104-458, at 168, *reprinted in* 1996 U.S.C.C.A.N. 10, at 181 (emphasis added).

### B. The Commission Should Include Pole Attachment Fees as External costs.

Comcast believes the Commission should include as an "external cost" under Section 76.922(f) of the rules increases in pole attachment fees cable operators are forced to incur for the provision of rate-regulated cable services. At the very least, the Commission should include in this rule pole attachment fees remitted to municipal and cooperative electric utilities, which are exempt from the protections afforded to cable operators and telecommunications providers under the Pole Attachment Act.[160] Such fees should be subject to the same regulatory treatment as franchise fees. The Commission should therefore clarify that operators will be permitted to reflect these fees as a line item *on* customer bills in the same manner as franchise fees.

In the *Second Reconsideration Order,* the Commission declined to treat pole attachment fees as external costs under the rate regulations because

> [u]nlike increases in franchise fees or taxes, pole attachment fees are not imposed by the government nor are they, like programming expenses, an area with respect to which the legislative history of the 1992 Cable Act expresses explicit concern. In addition, some pole attachment fees are regulated under the 1978 Pole Attachment Act . . . which should provide operators some recourse against unreasonable pole attachment fee increases.[161]

Although the Commission stated it would consider waivers "in instances of significant hardship resulting from unusually large pole attachment fee increases imposed by utilities or other pole providers not subject to regulation under the Pole Attachment Act[,]"[162] to date no such waiver has been granted.'"

[160] 47 U.S.C. § 224

[161] *Second Reconsideration Order,* 9 FCC Rcd at 4206, para. 182.

[162] *Id.* at n.243.

[163] *See The Helicon Group, L.P.,* 11 FCC Rcd 2376 (Cab. Serv. Bur. 1996); *TCI of Seattle, Inc.,* 11 FCC Rcd 2378 (Cab. Serv. Bur. 1996); *TCI Cablevision of Washington,* 11 FCC Rcd 2380 (Cab. Serv. Bur. 1996); *United Cable Television of East San Fernando Valley, Ltd.,* 11 FCC Rcd 2382 (Cab. Serv. Bur. 1996).

As the Commission is aware, even among entities subject to the Pole Attachment Act, the magnitude of unreasonable pole attachment fee increases has increased exponentially since adoption of the 1996 amendments to the Pole Attachment Act, which, among other things, mandated a new pole attachment rate formula for telecommunications attachments.[164] In Comcast's experience such rate increases have been even more unreasonable where the pole owner is unrestrained by the Pole Attachment Act. Comcast therefore urges the Commission to relieve cable operators of the undue administrative burden of seeking a waiver to obtain relief from unreasonable increases in costs that are clearly beyond the control of the operator. As the Commission has held with regard to other external costs, "[t]hese costs are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing."[165]

### C. The Commission Should Clarify That it Intends to Retain the Bill Itemization Rule.

Finally, paragraph 9 of the *NPRM* indicates that the Commission proposes to delete, among other things, Section "76.985 (FCC Form 329 and Instructions)." Comcast agrees that given the deregulation of CPSTs, the FCC Form 329 "Cable Programming Service Rate Complaint Form" and its instructions, which appear in the Commission's rules immediately following Section 76.985 "Subscriber bill itemization,"[166] are no longer relevant and should be deleted, Nevertheless, because the substance of Section 76.985 governs bill itemization rather than CPST complaints, Comcast suggests that to avoid any possible confusion, the Commission

---

[164] *See, e.g., Teleport Communications Atlanta, Inc. v. Georgia Power Company,* 16 FCC Rcd 20238 (Cab. Serv. Bur. 2001), *petition for review pending sub nom. Georgia Power v. Federal Communications Commission,* No. 02-10222-B (11th Cir. filed January 11, 2002), *application for review denied,* FCC 02-270, __ FCC Rcd __ (released Oct. 8,2002).

[165] *Rate Order,* 8 FCC Rcd at 5790, para. 254.

[166] 47 C.F.R. § 76.985.

should clarify that it intends to retain the substance of its rule and to delete only the FCC Form 329 and its associated instructions.

## CONCLUSION

For the foregoing reasons, the Commission should adopt the proposals and recommendations set forth herein.

Respectfully Submitted,

COMCAST CABLE COMMUNICATIONS, INC

By: ____________________

Peter H. Feinberg
Gary S. Lutzker

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Their Attorneys

Thomas R. Nathan, Esq.
Senior Vice President of Law
Comcast Cable Communications, Inc.
1500 Market Street, 34th Floor
Philadelphia, Pennsylvania 19102

Kathryn A. Hutton, Esq.
Senior Counsel
Comcast Cable Communications, Inc.
1500 Market Street, 34th Floor
Philadelphia, Pennsylvania 19102

Of Counsel

November 4,2002

## HISTORICAL APPENDIX

### Development of the Commission's Rules for the Addition, Deletion, and Movement of Regulated Programming Services

In the *Third Notice of Proposed Rulemaking*[167] in its cable rate regulation proceeding, the Commission considered three proposals for adjusting rates to account for the addition and deletion of channels under the benchmark rate-setting methodology. Under the first proposed methodology, the rate would have consisted of the sum of (i) the current permitted charge for the existing channels on the tier; and (ii) a charge for the new channels consisting of the benchmark rate for the total number of channels on the tier multiplied by the number of new channels. The Commission concluded it should reject this proposal because, among other things, it would have permitted pricing above the economies of scale reflected in the benchmark curve and because the Commission was uncertain that the proposal "would work for determining the new permitted rate associated with channel deletions."[168]

Under the second proposed methodology, "the new permitted rate for a regulated tier with added or deleted channels would [have] be[en] the benchmark per channel rate based on the new number of channels on the system multiplied by the number of channels on the tier." The Commission concluded it should not adopt this proposal "because it would create substantial disincentives for cable operators with rates above the benchmark to add channels" and "could create undue incentives for systems with rates below benchmark rates to add channels, permitting substantially increased rates."[169]

Under the third proposed methodology, which the Commission subsequently adopted,

> the new permitted per channel rate [would] be the existing permitted per channel rate adjusted for programming

[167] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking,* 9 FCC Rcd 1164, 1239-46 at paras. 132-144 (1993).

[168] *Id.* at 1243, para. 137.

[169] *Id.* at para. 138.

> expense . . . and adjusted to reflect the same proportionate per channel rate increase or decrease observed in the benchmark curve. Under this option, the new permitted per channel rate would not directly reflect the benchmark rate but only the benchmark's proportionate increase or decrease in per channel rates."[170]

The Commission concluded that it should adopt this approach because, among other things, it "would benefit subscribers by requiring that rates reflect the same efficiencies and economies of scale observed in benchmark rates."[171] The Commission specifically determined that its methodology would apply to both the addition and deletion of channels.[172]

In the *Second Reconsideration Order,*[173] the Commission adopted the third proposal outlined in its *Third Notice of Proposed Rulemaking* for both the addition and deletion of channels.[174] The Commission stated that the third proposal — whichbecame known the "Mark-Up" methodology because it required a **7.5%** mark-up or mark-down on certain external costs while limiting the non-external portion of any rate adjustment to only the incremental change in the benchmark rate associated with the added or deleted services[175] — was "fully compatible with [the Commission's] revised benchmark formula and approach for setting regulated rates,"[176] and noted that the first two alternative proposals were "not compatible with [the] revised benchmark approach and cannot be adopted."[177] The Commission explained that under the Mark-Up method:

---

[170] *Id* at para. 139.

[171] *Id.* at 1244, para. 140.

[172] *Id.* at 1246, n.252.

[173] *Second Reconsideration Order,* 9 FCC Rcd 4119.

[174] *Id.* at 4241-4244, paras. 244-248.

[175] *Id.* at 4242-43, n.345. The Commission chose the 7.5% mark-up rate as "a cautious choice for an annual permitted mark-up on programming expense" to balance its belief that the return on programming expense should be less than the 11.25% return adopted in its cost-of-service proceeding with its concern of assuring "the continued growth of programming services" by avoiding establishing a return "at a minimal level." *Id.*

[176] *Id.* at 4241, para. 244 (footnote omitted).

[177] *Id.* at n.341.

> operators will first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a specified amount per channel when the total number of regulated channels increases. Should the total number of regulated channels decrease, the residual component of [the] tier charge will be reduced by a specified amount. The per-channel adjustment factors used to calculate permitted tier charges are derived from our benchmark equation and appear as a Table . . . .[178]
>
> * * * *
>
> When a cable system changes the number of regulated channels offered, it must average the initial and final number of channels and find the adjustment factor in the table corresponding to that average. For any service tier, *the total permitted adjustment is the product of the per channel adjustment factor and the change in the number of regulated channels on that tier. The adjustment is positive if the number of regulated channels has increased and negative if the total number of regulated channels has decreased.* If a cable operator is merely restructuring tiers and there is no change in the total number of regulated channels, then the operator would find its total number of regulated channels in the table, note the corresponding per channel adjustment factor, and calculate adjustments in network costs per tier as explained earlier in this paragraph. After the residual component of the tier charge is adjusted in this fashion, all external costs, including programming expenses, will be combined with the adjusted residual to determine the final tier charge. As stated, any increased level of programming expense will be entitled to a 7.5 percent mark-up."'

The Commission codified its procedure for adjusting regulated rates to reflect the addition and deletion of channels in Section 76.922(e) of its rules.[180] For the overwhelming majority of cable television systems, the Commission's Mark-Up methodology resulted in a non-external per-channel rate adjustment in the range of $0.01 to $0.03 whenever a regulated programming service was either added to or deleted from a regulated tier.[181]

---

[178] *Id.* at 4243, para. 247. The Commission's per-channel adjustment factor table originally appeared in Section 76.922(e)(1) of the rules, 47 C.F.R. § 76.922(e)(1) (1994), and now appears in Section 76.922(g)(2) (2001).

[179] *Id.* at 4244, para. 248 (emphasis added).

[180] 47 C.F.R. § 76.922(e) (1994). The Commission's pre-existing rule is attached hereto as Exhibit 1. FCC Form 1210 incorporated the methodology in Module G and FCC Form 1240 incorporated the methodology in Worksheet 3.

[181] The table in Section 76.922(e)(1) (1994) of the Commission's rules specified a $0.03 per channel non-external rate adjustment for cable systems with between 30 and 35.5 average regulated channels, a $0.02 adjustment for systems with between 36 and 46 regulated channels, and a $0.01 adjustment for systems with between 46.5 and 99.5 regulated channels. 47 C.F.R.

*(continued. . .)*

With the benefit of experience, the Commission soon understood that the modest per-channel rate adjustment permitted under the Mark-Up methodology provided an economic disincentive for cable operators to expand their systems and their services — and consequently was inconsistent with the 1992 Cable Act's policy of "ensur[ing] that cable operators continue to expand [them], where economically justified."[182] In the *Sixth Reconsideration Order*,[183] therefore, the Commission determined, among other things, to experiment with eliminating that disincentive and, as an interim measure, temporarily permitted cable operators to add as many as seven programming services to their CPSTs at $0.20 per channel plus $0.05 per channel license fees.[184] This new methodology became known as the "Caps" method.

However, because the *Sixth Reconsideration* Order authorized non-external price adjustments for the addition of CPST channels in excess of the commensurate adjustment under the benchmark methodology established pursuant to the 1992 Cable Act, and because, among other things, the *Sixth Reconsideration Order* departed from the Commission's tier neutral benchmark rate-setting methodology for the addition and deletion of regulated services, the Commission expressly limited the term of its new interim rules to the period ending December 31, 1997. The Commission justified its interim departure from tier-neutrality to (i) preserve rate stability on the BST, (ii) maximize subscriber choice by providing enhanced incentives to add services to CPSTs, and (iii) avoid increasing "the complexity of the regulatory task faced by local

*(. . . continued)*
§ 76.922(e)(1) (1994). Following adoption of the Commission's annual rate adjustment rules in the *Thirteenth Reconsideration Order,* the rule and the table were relocated to Section 76.922(g)(2). *See Thirteenth Reconsideration Order,* 11 FCC Rcd at 456-92, App. B; 47 C.F.R. § 76.922(g)(2) (2001).

182 1992 Cable Act, § 2(b)(2), 106 Stat. 1463.

183 10 FCC Rcd 1226.

184 *Sixth Reconsideration Order,* 10 FCC Rcd at 1244-1257, 1260, paras. 54-86, 98. *See* Exhibit 2. The Commission also temporarily adopted, among other things, new associated interim methodologies for adjusting regulated rates to reflect the addition, deletion, movement, and substitution of regulated programming services on and between regulated BSTs and CPSTs.

regulatory authorities."[185] Absent additional Commission action to extend the new rules, which the Commission later declined to undertake, the Commission specified that its pre-existing rules for the addition and deletion of regulated services would he reinstated automatically and the new rules would be deleted pursuant to the terms of the *Sixth Reconsideration Order*.[186]

> The new rule for adjusting rates when channels are added, deleted or substituted on CPSTs will be in place through December 31, 1997, and will be reviewed prior to the end of that period to determine if there is any reason to continue to provide incentives to increase the number of channels on any CPST. The new rule will expire on that date and will be replaced by our existing rule unless it is reinstated by the Commission.[187]

Although paragraph 98 of the *Six Reconsideration Order* refers to the CPST, the practical consequences of the new rule also significantly altered the calculation of BST rates despite the Commission's specific determination that "[r]ates for the BST will continue to be governed exclusively by our current rules."[188] In contrast to the Commission's stated intention, the codification of the new rules in fact departed from the then current BST rules by limiting application of the Mark-Up methodology to the *addition* of BST channels rather than the addition and deletion of such channels, as required under the Commission's *Second Order on Reconsideration. Compare* 47 C.F.R. § 76.922(e) (1994)[189] with 47 C.F.R. § 76.922(e)(2) (1995).[190]

This inconsistency apparently resulted from the Commission's effort to devise a single methodology to account both for the movement of programming services between regulated tiers,

---

185 *Sixth Reconsideration Order,* 10 FCC Rcd at 1250-51 (footnote omitted).

186 *Id.* at 1248-49, para. 65, and 1260, para. **98.**

187 *Id.* at 1260, para. 98.

188 *Id.* at 1249, para. 65.

189 47 C.F.R. § 76.922(e) (1994): *Changes in the number of channels on regulated tiers,* attached hereto as Exhibit 1.

190 47 C.F.R. § 76.922(e)(2) (1995): *Adjusting Rates for increases in the number of channels offered between May* ***15,*** *1994 and December 31, 1997, on a basic service tier and at the election of the operator on a cableprogramming service tier,* attached hereto as Exhibit 2.

where the total number of programming services carried on regulated tiers remained unchanged, and for increases and decreases in the total number of programming services on regulated tiers. **A** methodology to account for the movement of channels between regulated BSTs and CPSTs would be designed to ensure that the operator's non-external costs and Caps method adjustments were accurately distributed among regulated tiers when programming services were moved between them. On the other hand, under this methodology, accounting for increases and decreases in the total number of regulated channels also would necessarily be designed to reflect (i) the benchmark curve for non-Caps channels and (ii) the actual Caps method adjustment for eligible channels added during the interim period that ended on December 31, 1997. This attempt to craft a reasonable and administratively workable means to account for both channel movements as well as additions and deletions notwithstanding, however, the Commission's interim methodology for calculating the non-external, or "residual," portion of the regulated per-channel rate neglected to distinguish between channel movements and channel additions and deletions.

Consequently, the Commission's new, temporary methodology for calculating a channel's residual cost for purposes of moving channels between regulated tiers and for deleting channels specified that:

> Operators also will be required to reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on or before May 14, 1994 or channels added after that date pursuant to the current rules, the per channel residual is the charge for the tier, minus the external costs for the tier, and any per channel adjustments made after that date, divided by the number of channels on the tier. For channels added to a CPST on or after May 15, 1994 pursuant to our new channel addition rules, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier plus any inflation adjustment since that time. The residual and programming cost shall be calculated as of the date the channel is dropped.'"

[191] ***Sixth Order** on **Reconsideration,*** 10 FCC Rcd at 1256, para. 84.

The Commission's temporary method for calculating channel residuals was strikingly similar to the first proposed methodology set forth the *Third Notice of Proposed Rulemaking*, which the Commission rejected in the *Second Order on Reconsideration*.[192] Nevertheless, for the period ending December 31, 1997, the Commission's new temporary rule limited cable operators to the Mark-Up method for adjusting rates to reflect an additional BST channel, but required use of the new residual calculation to reflect **a** BST channel deletion, despite the Commission's stated determination that BST rates would continue to be governed by the Mark-Up method. In practice, the Commission's temporary rule permitted a non-external rate adjustment of, *e.g.*, between $0.01 and $0.03 for the addition of a new BST programming service, but required between approximately a $0.30 to $0.50 adjustment if an existing BST programming service were deleted or moved to the then regulated CPST.[193]

Given the Commission's stated determination to continue governing BST rates under the Mark-Up methodology,[194] and to preserve rate stability on the BST,[195] these further temporary rule modifications were inextricably related to implementation of the Commission's interim Caps channel addition methodology. Thus, in addition to temporarily adopting the "Caps" method for the addition of CPST channels, the Commission also intended to *temporarily* limit application of the Mark-Up methodology to the addition of BST channels, and *temporarily* revised the method for calculating non-external, or "residual," costs for purposes of moving, substituting, and deleting channels from regulated tiers. **As** noted, the Commission's interim methodology for calculating the non-external, or "residual," portion of the regulated rate ensured only that the operator's non-external costs and Caps method adjustments were accurately distributed between

---

[192] ***See*** *supra* p.21, and *Third Notice of Proposed Rulemaking*, 9 FCC Rcd at 1243, para. 137.

[193] The FCC's revised Form 1210 incorporated the Mark-Up method in Module G, the revised residual calculation in Module H, and the Caps method in Module F. FCC Form 1240 incorporates the Mark-up Method in Worksheet 3, the revised residual calculation in Worksheet 4, and the Caps method in Worksheet 2.

[194] *Sixth Reconsideration Order;* 10 FCC Rcd at 1249, para. 65.

[195] *Id.* at 1250-51.

regulated tiers when programming services were moved between them, but failed to accurately reflect the benchmark curve with regard to the deletion of non-Caps channels.

# CERTIFICATE OF SERVICE

I, Sandra Dallas, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, certify that on this fourth day of November 2002, I caused the foregoing Comments of Comcast Cable Communications. Inc. to be served bv first-class mail, except where hand delivery is indicated, on the following:

Michael K. Powell, Chairman*
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

Susan M. Eid*
Legal Advisor to Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Stacy Robinson*
Legal Advisor to Commissioner Abemathy
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115C
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

Susanna Zwerling*
Legal Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

Commissioner Kevin J. Martin*
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, DC 20554

Catherine Crutcher Bohigian*
Legal Advisor to Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204F
Washington, DC 20554

W. Kenneth Ferre*
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C740
Washington, DC 20554

William Johnson*
Deputy Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C742
Washington, DC 20554

Marjorie Reed Greene*
Associate Bureau Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

John B. Norton*
Deputy Division Chief, Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C764
Washington, DC 20554

Sandra Dallas

Sandra Dallas

**By Hand* ***Delivery***

Exhibit 1

increase its rates subsequently to reflect the changes.

(ii) A system must adjust its rates in the next calendar year quarter for any decrease in programming costs that results from the deletion of a channel or channels from a regulated tier.

(iii) Any rate increase made to reflect an increase in external costs must also fully account for all other changes in external costs. inflation and the number of channels on regulated tiers that occurred during the same period. Rate adjustments made to reflect changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment waa Previously made through the end of the quarter that has most recently closed Preceding the filing of the FCC Form 1210 (or FCC Form 1211. where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient information to calculate the rate change.

(iv) External costs shall consist of costs in the following categories:

(A) State and local taxes applicable to the provision of cable television service;

(B) Franchise fees;

(C) Costs of c with r requirements, including costs of providing public, educational. and governmental access channels as required by the franchising authority;

(D) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; and

(E) Other programming costs.

(v) The permitted charge for a regulated tier shall be adjusted on account of programming costs. copyright fees and retransmission consent fees only for the program channels or broadcast signals offered on that tier.

(vi) The permitted charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6.1994.

(vii) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994.

(viii) Changes in franchise fees shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(ix) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers. as defined in 076.901. shall be permitted as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

(x) Adjustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any by the oper tor from the programmer.

(xi In calculating programming ex- ens , operators may add a mark-up of 7.5% for new programming added after May 15, 1994 and shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994.

(e) *Changes in the number of channels on regulated tiers.* (1) A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a regulated tier. Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However, when it deletes channels in a calendar quarter, a system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. The following table shall be used to adjust permitted rates for a tier for changes in the number of channels offered on the tier. The entries in the table provide

| Average number of regulated channels | Per-channel adjustment factor |
|---|---|
| 7 | $0.52 |
| 7.5 | 0.45 |
| 8 | 0.40 |
| 8.5 | 0.38 |
| 9 | 0.33 |
| 9.5 | 0.29 |
| 10 | 0.27 |
| 10.5 | 0.24 |
| 11 | 0.22 |
| 11.5 | 0.20 |
| 12 | 0.19 |
| 12.5 | 0.17 |
| 13 | 0.16 |
| 13.5 | 0.15 |
| 14 | 0.14 |
| 14.5 | 0.13 |
| 15–15.5 | 0.12 |
| 16 | 0.11 |
| 16.5–17 | 0.10 |
| 17.5–18 | 0.09 |
| 18.5–19 | 0.08 |
| 19.5–21.5 | 0.01 |
| 22–23.5 | 0.08 |
| 24–26 | 0.05 |
| 26.5–29.5 | 0.04 |
| 30–35.5 | 0.03 |
| 36–46 | 0.02 |
| 48.5 and above | 0.01 |

(2) In order to adjust the residual component of the tier charge when there is a change in the number of channels on a tier, the operator shall perform the following calculations:

(i) Take the sum of the old total number of channels on tiers subject to regulation (*i.e.*, tiers that are, or could be, regulated) and the new total number of channels and divide the resulting number by two;

(ii) Consult the table in paragraph (e)(1) of this section to find the applicabl[illegible] p[illegible] c[illegible]l adj[illegible]tment factor for the number [illegible] ch[illegible]el[illegible] [illegible]ced by th[illegible] [illegible] ti[illegible] in p[illegible]ragr[illegible] [illegible](2)(i) of this section. For each tier [illegible] which there has been a change in the nu[illegible]b[illegible] of channels multiply the per-cha[illegible] adjustment factor times the change [illegible] th[illegible] [illegible]be[illegible] of [illegible]els on that t[illegible]. The result is th[illegible] total adjustment [illegible] th[illegible]t tier. It i[illegible] p[illegible]iti[illegible]e if the number of channels on the tier has increased [illegible]d negative if the number of ch[illegible]ls has decreased.

(f) P[illegible]itte[illegible] ha[illegible] for a tier shall be [illegible] [illegible]d in [illegible]ordance with forms and associated instructions established by the Commission.

(g) *Cost of* service charge. (1) For purpose of this section. a monthly cost-of-service charge for a basic service tier or a cable programming service tier is an amount equal to the annual revenue requirement for that their divided by a number that is equal to 12 times the average number of subscribers to that tier during the test year, except that a monthly charge for a system or tier in service less than one year shall be equal to the projected annual revenue requirement for the first la months of operation or service divided by a number that is equal to 12 times the projected average number of subscribers during the first 12 months of operation or service. The calculation of the average number of subscribers shall include all subscribers. regardless of whether they receive service at full rates or at discounts.

(2) A test year for an initial regulated charge is the cable operator's fiscal year preceding the initial date of regulation. A test year for a change in the basic service charge that is after the initial date of regulation is the cable operator's fiscal year preceding the mailing or other delivery of written notice pursuant to §76.932. A test year for a change in a cable programming service charge after the initial rate of regulation is the cable operator's fiscal year preceding the filing of a complaint regarding the increase.

(3) The annual revenue requirement for a tier is the sum of the return component and the expense component for that tier.

(4) The return component for a tier is the average allowable test year ratebase allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate multiplied by the rate of return specified by the Commission or franchising authority.

(5) The expense component for a tier is the sum of allowable test year expenses allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate.

(6) The ratebase may include the following:

Exhibit 2

47 CFR (10-1-95 Edition)



changes in external costs shall be baaed on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient Information to calculate the rate change.

(iv) External costs shall consist of costs in the following categories:

(A) State and local taxes applicable to the provision of cable television service;

(B) Franchise fees:

(C) Costs of complying with franchise requirements. including costs of providing public. educational, and governmental access channels as required by the franchising authority:

(D) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; and

(E) Other programming costs.

(F) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. 159.

**(v) The permitted ch [illegible] e** for a *regulated* **tier shall be a [illegible]** account **of programming co[illegible]ts, c[illegible]** fees **and retransmission cons[illegible]nt** fees only **for the program channels or** broadcast **signals offered on that tier.**

**(vi) The permi[illegible]ted [illegible] shall not be adjusted for c[illegible]st[illegible] f ret[illegible]missio[illegible] consent fees [illegible] in those fee i[illegible] ed pri[illegible] t [illegible] 6 1994 [illegible] Th[illegible] date for adj[illegible] or** account of [illegible] **osts** for a tier **of** regulated [illegible] be the [illegible] of the [illegible] te **of** regulation **for any** [illegible] or [illegible] tier **or February 28,** 1994.

**(v[illegible] ha[illegible]** in **fra[illegible]** shall **not result In [illegible] dju[illegible]t [illegible] permitted [illegible] rather shall [illegible] culate[illegible] [illegible]par[illegible]** as **p[illegible] f t[illegible] mum monthly [illegible] rg [illegible] a ti[illegible] f regulated programming service.**

**(i[illegible] ts to pe[illegible]itt[illegible]ed ha[illegible]** to reflect **[illegible] in th[illegible] costs [illegible] purchased from affilite[illegible] programmers** as **d[illegible]** 576.901, **shall be** permitted as long **as** the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the **fair** market value *of* the programming.

(x) Adjustments to permitted charges on account of increase in costa of programming shall be further adjusted to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis.

**(xi)** In calculating programming expense. operators may add a mark-up of 7.5% for increases in programming costs occurring **after** March 31,1994. except that operators **may** not file for or take the *1.5%* mark-up **on** programming costs for new channels added **on** or after May **15, 1994** for which **the** operator **has** used the methodology set forth **in paragraph** (e)(3) of this section for **adjusting** rates for channels added to cable **programming** service tiers. Operators shall reduce rate8 by **decreases** in **programming** expense plus **an** additional 7.5% for **decreases occurring** after May 15, 1994 except with respect to **programming** cost **decreases on** channels added **after** May **15, 1994** for which the rata adjustment methodol*ogy* in **paragraph (e)(3)** of this section was used.

(e) *Changes* in the ***number of channels*** on ***regulated*** *tiers*—(1) Generally. **A** system **may** adjust the residual component of its permitted rate for a tier ***to*** reflect changes in the number ***of*** **chan**nels offered **on** the tier **on** a quarterly basis. Cable systems shall **use** FCC Form 1210 (or FCC Form 1211, where applicable) to justify **rate** changes made **on** account **on** changes in **the** number of channels **on** a basic service tier ("BST") or a cable **programming** service tier ("CPST"). Such **rate adjustments** shall be based **on any** changes in the **number** of regulated channels that occurred **from** the end of the last **quar**ter for which an adjustment was previously made through the end of the quarter that **has** most recently closed preceding the filing of **the** FCC Form 1210 (or FCC Form 1211, where applicable). However. when a **system** deletes channels in a calendar quarter. the system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. Operators must elect between the channel addition rules in paragraphs (e)(2) and (e)(3) of this section the first time they adjust rates after December 31, 1994, tc reflect a channel addition to a CPST that occurred on or after May 15. 1994. and must use the elected methodology for all rate adjustments through December 31, 1997. A system that adjusted rates after May 15, 1994, but before January 1, 1995 on account of a change in the number of channels on a CPST that occurred after May 15, 1994, may elect to revise its rates to charge the rates permitted by paragraph (e)(3) cf this section on or after January 1, 1995, but is not required to do so as a condition for using the methodology in paragraph (e)(3) of this section for rate adjustments after January 1, 1995. Rates for the BST will be governed exclusively by paragraph (e)(2) of this section. except that where a system offered Only one tier on Mag 14, 1994. the cable operator will be allowed to elect between paragraphs (e)(2) and (e)(3) of this section as if the tier was a CPST.

(2) Adjusting Rates for increases in the number *of* channels *offered* between May ***15, 1994,*** and December ***31,1997, on*** a basic service tier and at the election *of* the *operator on* a cable *programming service* tier. The following table shall be used to adjust Permitted rates for increases in the number of channels offered between May 15, 1994, and December 31, 1997, on a basic service tier and subject to the conditions in paragraph (e)(1) of this Section at the election of the operator on a CPST. The entries in the table Provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

| Average No. of regulated channels | Per-channel adjustment factor | Average No. of regulated channels | Per-channel adjustment factor |
|---|---|---|---|
| 7 | $0.52 | 14 | 0.14 |
| 7.5 | 0.45 | 14.5 | 0.13 |
| 8 | 0.40 | 15–15.5 | 0.12 |
| 8.5 | 0.38 | 16 | 0.11 |
| 9 | 0.33 | 16.5–17 | 0.10 |
| 9.5 | 029 | 17.5–18 | 0.09 |
| 10 | 0.27 | 18.5–19 | 0.08 |
| 10.5 | 024 | 19.5–21.5 | 0.07 |
| 11 | 0.22 | 22–23.5 | 0.06 |
| 11.5 | 0.20 | 24–26 | 0.05 |
| 12 | 0.19 | 26.5–29.5 | 0.04 |
| 12.5 | 0.17 | 30–35.5 | 0.03 |
| 13 | 0.16 | 34–46 | 0.02 |
| 135 | 0.15 | 46.5–99.5 | 0.01 |

In order to adjust the residual component of the tier charge when there is an increase in the number of channels on a tier, the operator shall perform the following calculations:

(i) Take the sum of the old total number of channels on tiers subject to regulation (*i.e.,* tiers that are, or could be, regulated but excluding New Product Tiers) and the new total number of channels and divide the resulting number by two;

(ii) Consult the above table to find the applicable per channel adjustment factor for the number of channels produced by the calculations in paragraph (e)(2)(i) of this section. For each tier for which there has been an increase in the number of channels. multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier.

(3) *Alternative* methodology *for* adjusting rates for changes *in* the number of channels *offered* ***on*** *a* cable programming service tier or a single tier system between May ***15,1994,*** and December ***31,1997.*** This Paragraph at the Operator's discretion as set forth in paragraph (e)(1) of this section shall be used tc adjust permitted rates for a CPST after December 31, 1994. for changes in the number Cf channels offered on a CPST between May 15,1994, and December 31, 1997. For purposes of this paragraph (e)(3) of this Section, a single tier System may be treated as if it were a CPST.

(i) *Operators* cap attributable ***to new*** channels ***on*** *all CPSTs* through December *31,* ***1997.*** Operators electing to use the methodology set forth in this paragraph may increase their rates between January 1, 1995. and December 31, 1997. by UP tc 20 cents per channel, exclusive of Programming costs. for new channels added to CPSTs on or after May 15, 1994. except that they may not make rate adjustments totalling more than ***$1.20*** per month. per subscriber through December 31.1998, and by more than $1.40 per month, per subscriber through December 31, 1997 (the "Operator's Cap"). Except to the extent that the programming costs of such channels are covered by the License Fee Reserve provided for in paragraph (e)(3)(iii) of this section. programming costs associated with channels for which a rate adjustment is made pursuant to this paragraph (e)(3) of this section must fall within the Operator's Cap if the programming costs (including ***any*** increases therein) are reflected in rates before January 1, 1997. Inflation adjustments pursuant to §76.922(d)(2) are not counted against the Operator's Cap.

(ii) ***Per*** channel adjustment. Operators may increase rates by a per channel adjustment of up to 20 cents per subscriber per month. exclusive of Programming costs, for each channel added to a CPST between May 15, 1994, and December 31. 1997. except that an operator ***may*** take the per channel adjustment only for channel additions that result in an increase in the highest number of channels offered on all CPSTs as compared to May 14. 1994, and each date thereafter. Any revenues received from a programmer, or shared by a programmer and an operator In connection with the addition of a channel to a CPST shall first be deducted from programming costs for that channel pursuant to paragraph (d)(3)(x) of this section and then, to the extent revenues received from the programmer are greater than the programming costs, shall be deducted from the per channel adjustment. This deduction will apply on a channel by channel basis.

(iii) License fee *reserve.* In addition to the rate adjustments permitted in paragraphs (e)(3)(i) and (e)(3)(ii) of this section operators that make channel additions on or after May 15, 1994 may increase their rates by a total of 30 cents per month. per subscriber between January 1, 1995, and December 31, 1998, for license fees associated with such channels (the "License Fee Reserve"). The License Fee Reserve may be applied against the initial license fee and ***any*** increase in the license fee for such channels during this period. ***An*** operator may pass-through to subscribers more than the 30 cents between January 1, 1995, and December 31, 1996, for license fees associated with channels added after May 15, 1994, provided that the total amount recovered from subscribers for such channels, including the License Fee Reserve, does not exceed $1.50 per subscriber. Per month. After December 31,1996. license fees may be passed through to subscribers pursuant to paragraph (d) of this section. except that license fees associated with channels added pursuant to this paragraph (d)(3) of this section will not be eligible for the 7.5% mark-UP on increases in programming costs.

(iv) *Timing.* For purposes of determining whether a rate increase counts against the maximum rate increases specified in paragraphs (e)(3)(i) through (e)(3)(iii) of this section, the relevant date shall be when rates are increased as a result of channel additions, not when the addition occurs.

(4) Deletion ***of*** Channels. When dropping a channel from a BST or CPST. operators shall reflect the net reduction in external costa in their rates pursuant to paragraphs (d)(3) (i) and (ii) of this section. With respect to channels to which the 7.5% mark-up on programming costa applied pursuant to paragraph (d)(3)(xi) of this section, the operator shall treat the mark-up as part of its programming costs and subtract the markup from its external costs. operators shall also reduce the price of that tier by the "residual" associated with that channel. For channels that were on a BST or CPST on May 14, 1994, or channels added after that date pursuant to paragraph (e)(2) of this section. the per channel residual is the charge for the tier, minus the external costs for the tier. and any per channel adjustments made after that date, divided by the total number of channels on the tier minus the number of channels on the tier that received the per channel adjustment specified in paragraph (e)(3) of this section. For channels added to a CPST after May 14, 1994, pursuant to paragraph (e)(3) of this section, the residuals shall be the actual per channel adjustment taken for that channel when it was added to the tier.

***(5)*** *Movement* of channels betwem tiers. When a channel is moved from a CPST or a BST to another CPST or BST. the price of the tier from which the channel is dropped shall he reduced to reflect the decrease in programming costs and residual as described in paragraph (e)(4) of this section. The residual associated with the shifted channel shall then be converted from per subscriber to aggregate numbers to ensure aggregate revenues from the channel remain the same when the channel is moved. The aggregate residual associated with the shifted channel may be shifted to the tier to which the channel is being moved. The residual shall then be converted to per subscriber figures on the new tier, plus any subsequent inflation adjustment. The price of the tier to which the channel is shifted may then be increased to reflect this amount. The price of that tier may also be increased to reflect any increase in programming cost. An operator may not shift a channel for which it received a per channel adjustment pursuant to paragraph (e)(3) of this section from a CPST to a BST.

(6) *Substitution of channels on a BST or CPST.* If an operator substitutes a new channel for an existing channel on a CPST or a BST. no per channel adjustment may be made. Operators substituting channels on a CPST or a BST shall be required to reflect any reduction in programming costs in their rates and may reflect any increase in programming cost8 pursuant to paragraphs (d)(3)(i) and (d)(3)(ii) of this section. If the programming cost for the new channel is greater than the programming cost for the replaced channel. and the operator chooses to pass that increase through to subscribers. the excess shall count against the License Fee Reserve or the Operator cap when the increased cost is passed through to subscribers. Where an operator substitutes a new channel for a channel on which a 7.5% mark-up on programming costs was taken pursuant to paragraph (d)(3)(xi) of this section. the operator may retain the 7.5% mark-up on the license fee of the dropped channel to the extent that it is uo greater than 7.5% of programming cost of the new service.

(7) *Headend upgrades.* When adding channels to CPSTs and single-tier systems, cable systems that are owned by a small cable company and incur additional monthly per subscriber headend costs of one full cent or more for an additional channel may choose among the methodologies set forth in paragraph (e)(2) and (e)(3) of this section. In addition, such systems may increase rates to recover the actual cost of the headend equipment required to add up to seven such channels to CPSTs and single-tier systems. not to exceed $5,000 per additional channel. Rate increases pursuant to this paragraph may occur between January 1. 1995. and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the equipment. The rate of return on this investment shall not exceed 11.25 percent. In order tc recover costs for headend equipment pursuant to this paragraph. systems must certify to the Commission their eligibility to use this paragraph, and the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

(8) *Sunset provision.* Paragraph (e) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission.

(f) Permitted charges for a tier shall be determined in accordance with forms and associated instructions established by the Commission.

(g) *Cost of service charge.* (1) For purpose of this section. a monthly cost-of-service charge for a basic service tier or a cable programming service tier is an amount equal to the annual revenue requirement for that their divided by a number that is equal to 12 times the average number of subscribers to that tier during the test year, except that a monthly charge for a system or tier in service less than one year shall be equal to the projected annual revenue requirement for the first 12 months of operation or service divided by a number that is equal to 12 times the projected average number of subscribers during the first 12 month of operation or service. The calculation of the average number of subscribers shall include all subscribers. regardless of whether they receive service at full rates or at discounts.